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The end of the pension scheme – liability management, wind-up and the PPF

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Investment, the Pension Protection Fund and the Financial Assistance Scheme

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Trustee investment powers and duties

Powers

- Same powers to invest as if were absolute owners (s34(1), PA'95)
- Provisions of trust deed and rules

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Trustee investment powers and duties

Duties: common law

- Prudent person principal (*re Whiteley*)
- Invest in members' best financial interests (*Cowan v Scargill*)

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Trustee investment powers and duties

Trustee duties: statutory

- Statement of Investment Principles (s35, PA'95)
- Taking appropriate advice (s36, PA'95) and delegation of investment powers (s34, PA'95)
- Restrictions under financial services legislation
- Key duties under the Investment Regulations 2005
- Employer-related investment restrictions (s40, PA'95)
- Trustee knowledge and understanding (s247, PA'04)

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Taking the PPF into account?

- Do trustees owe any duty to the PPF when investing scheme assets before their scheme is in an “Assessment Period”?
- Can trustees take account of prospective PPF compensation when investing scheme assets before their scheme is in an assessment period?
- Short answer is “no”, with a possible exception

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Taking the PPF into account?

Independent Trustee Services Limited v Hope

- Background
- The power
- The proposal
- The decision
- Consequences

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Taking the PPF into account?

ITS v Hope: background

- The company
- The scheme
- Funding position
- The PPF

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Taking the PPF into account?

ITS v Hope: power

"At the discretion of the Trustees, they shall apply such amount as they shall decide, after taking Actuarial Advice, in the purchase of a Buy-out Policy in respect of a Member or other beneficiary, providing benefits in substitution for the benefits (or relevant part) which would otherwise have been payable under the Plan."

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Taking the PPF into account?

ITS v Hope: proposal

- Purchasing annuities
  - to secure benefits in full for members who had not reached NPA in relation to all of their benefits
  - to bridge the gap between PPF compensation and scheme benefits for members who had reached NPA in relation to all of their benefits

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Taking the PPF into account?

ITS v Hope: decision

- PPF is not a contingent beneficiary (so no duty is owed to it before a scheme is in an Assessment Period)

- However:
  - proposed buy-out was outside the purpose for which the power was given
  - trustee could not take account of prospective PPF compensation when deciding how to proceed

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Taking the PPF into account?

"Adopting that approach, I would hold, as a matter of law, that the prospective availability of compensation under the PPF, if and when the Scheme enters the PPF, is not a relevant factor for the Trustee to take into account in the exercise of the rule 12.3(b) power, or any power of a similar nature, because to take it into account would be contrary to the clear legislative policy of the Pensions Act 2004, and would thus be contrary to public policy. Further than that I would not, at present, go, bearing in mind that the existence of the PPF is in certain contexts a legitimate matter for trustees to take into account, and the dangers of invoking public policy in relation to a situation which is not before the court. **I would, however, say that if my conclusion in the present case is soundly based, I would expect a similar approach to be adopted in any instance where trustees seek to take advantage of the existence of the PPF as a justification for acting in a way which would otherwise be improper."**

(paragraph 119)

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Taking the PPF into account?

ITS v Hope: consequences (1)

- Most in focus where a DB scheme employer is in financial difficulties
- Provides additional bar to speculative investments
- Why should trustees worry about this?
  - no exclusion or restriction of liability for breach of investment duties (s34, PA'95)
  - transfer of liability to PPF (s161, PA'04) and carve-out (sch6, PA'04)
  - tPR power to appoint trustee with exclusive powers (s7, PA'95)

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Taking the PPF into account?

ITS v Hope: consequences (2)

- Keeping funding above PPF levels
- Taking the FAS into account
- *Independent Trustee Services Limited v GP Noble Trustees Limited and Others*

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Investing during a PPF assessment period

- Investment power and responsibility remains with trustees
- Investment duties remain the same or broadly the same
- Notify PPF of any significant changes in scheme investments within 14 days (sch2, PPF Information Regulations 2005)
- PPF power to direct trustees regarding scheme investments (s134, PA'04)
- Trustee good practice

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Investments by FAS qualifying schemes

- Investment power and responsibility remains with the trustees
- Investment duties remain broadly the same
- “Appropriate Person” to notify FAS manager of contemplated significant changes in investment of scheme assets within 14 days of becoming aware of contemplated change (sch1, FAS Information and Administration Regulations 2005)
- “Appropriate Person” includes trustees, but is much wider
- Trustee good practice

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